

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

77-1327

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee

v.

WILLIAM COOPER,

Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEE

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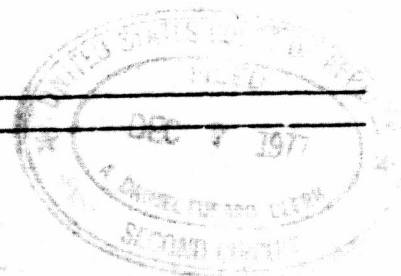


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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
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BRIEF FOR APPELLEE

ISSUES PRESENTED

1. Whether, after approximately three years' delay in beginning trial due to appellant's health, the court abused its discretion in denying a request for additional delay.

2. Whether the court's failure to give a jury instruction concerning the use of evidence of similar acts requires reversal in the absence of an objection and in the other circumstances of this case.

3. Whether monthly bank statements were properly admitted into evidence.

RULE INVOLVED

Rule 803(6), Fed.R.Evid., provides:

Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling every kind, whether or not conducted for profit.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of New York (Mishler, J.), appellant was convicted of two counts of interstate transportation of falsely made checks, in violation of 18 U.S.C. 2314. He was sentenced to concurrent terms of three years' imprisonment.

The evidence showed that appellant was president of Franklin Liquidator's Corporation (hereinafter "Franklin") a small Long Island firm which maintained its corporate checking account at the South Melville Branch of the Long Island Trust Company (Tr. 1.84, Gov't. Ex. 2).^{1/} On October 18, 1973, appellant deposited into the firm's account a countercheck^{2/} drawn on the First Wisconsin National Bank of Milwaukee, Wisconsin, ordering payment to Franklin of the sum of \$15,650.00 (Tr. 1.31-1.34; Gov't Ex. 28). The check was returned unpaid by the Wisconsin Bank, bearing the notation "Do Not Recognize" (Tr. 2.10-11). An officer of the Wisconsin Bank testified that the account number typed on the face of the check did not correspond to any account in that bank (Tr. 2.64), and that all their accounts bore nine-digit numbers, whereas the account number on appellant's check

1/ "Tr." refers to the trial transcript.

2/ A countercheck is a form which may be purchased at stationery stores or other commercial outlets. While checks issued by banks are specially micro-coded with the customer's account number, for computer purposes, counterchecks are blank.

was comprised of 10 digits (Tr. 2.66). The bank officer was also unable to identify the signer of the check (Tr. 2.67), but an agent of the Federal Bureau of Investigation testified that the endorsement matched handwriting samples submitted by appellant (Tr. 2.81; 2.73).

On October 25, 1973, appellant deposited another counter-check for \$15,375.00, payable to Franklin, drawn on the First National Bank of Chicago (Gov't. Ex. 30). This check was also returned with a notation of non-recognition (Tr. 2.60). A representative of the Chicago bank testified that his bank was unable to find either the name or the number on the check in their records, and that all account numbers issued by that bank contain seven digits and are evenly divisible by 11, whereas the account number on the check presented by appellant had more than seven digits and was not divisible by 11 (Tr. 2.56-58).

The manager of the South Melville branch, George King, spoke to appellant when these checks and several others started returning unpaid; appellant assured him that the situation would be straightened out (Tr. 1.65). When King was replaced in October 1973, the new branch manager, Charles Schramm, spoke twice with appellant about several returned checks and overdrafts and was also assured that everything would be cleared up (Tr. 1.3-33). By November 30, 1973, the overdraft that was created when the returned checks were debited from Franklin's account amounted to \$19,558.23 (Gov't. Ex. 3). Appellant and the bank eventually agreed to convert this balance into a loan with a fixed repayment schedule and appellant's pledge

of certain company merchandise as collateral (Tr. 2.47-49). The loan went largely unpaid; however, and was charged off in June 1974 with a remaining balance of \$16,501.86 (Tr. 2.19).

The defense presented no evidence.

ARGUMENT

I

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN REFUSING TO DELAY APPELLANT'S TRIAL FOR AN ADDITIONAL PERIOD BEYOND THE APPROXIMATELY THREE YEARS IT HAD ALREADY ALLOWED.

Appellant was indicted on April 29, 1974. After postponements totalling slightly more than three years, due primarily to appellant's health, trial was held in May 1977. Appellant here contends (Br. 11-19) that the district court erred in denying his motion for an additional postponement based upon his claim of physical disability. The record fails to demonstrate, however, that appellant's ability to defend himself was substantially impaired or that his three-day trial created a substantial risk to his life or health.

a. Appellant's medical problems first received the court's attention in November 1974, when appellant's physician, Dr. Norman Chernik, stated in a letter to defense counsel that, in his opinion, appellant would be unable to face the strain of trial at that time (App. 48A). There followed a period of nearly a year and a half, during which, as appellant has summarized it (Br. 12), there were "various communications with the court about [appellant's] ability, physically, to stand trial." In April 1976, a physician

retained by the government, Dr. Morton Marks, examined appellant and concluded that a trial "would pose no serious threat to his life" but nevertheless recommended that appellant not stand trial at that time (App. 50-51A). Several months later, on September 24, 1976, Dr. Chernik testified that appellant was suffering from significant pain and that he was currently taking medication which affected his mental capacity (App. 55A). He acknowledged, however, that he could not precisely indicate what impact the drugs would have on appellant's ability to assist in his defense (September 24, 1976 Hearing Transcript 25). Dr. Marks also recommended that appellant not stand trial, but testified that a trial would not endanger his life and that appellant would under normal circumstances be able to assist in his own defense (App. 62A). He stated that appellant's medication normally affects mental capacity, but declined to speculate about whether and to what extent the drugs might affect appellant in particular (App. 68A).

The court, unable to make a final determination, again continued the proceedings and appointed an internist, Dr. Renee Alsop, to examine appellant and render an independent opinion (App. 71A).^{3/} No objection to the qualifications of Dr. Alsop was raised at the time (April 29, 1977 Hearing Transcript 12). Dr. Alsop recognized that appellant was "suffering from a multitude of ills" including one he diagnosed as an ulcer, but advised that with proper medical care, "there is no reason why he could not defend himself in court, or consult in a satisfactory manner with his attorney." (App. 73A). The court,

^{3/} Appellant twice incorrectly identifies Dr. Alsop as a general practitioner (Br. 11, 22).

relying principally upon Dr. Alsop's findings and its own observations of appellant throughout the proceedings, then set a trial date (April 29, 1977 Hearing Transcript 15).^{4/}

b. The test for determining if a defendant's health should preclude his trial is whether his presence at the proceedings would seriously increase the risks to his well-being and whether his condition is such that it may substantially impair his ability to prepare a proper defense. United States v. Landsman, 366 F.Supp. 1027, 1028 (S.D.N.Y. 1973); United States v. Sweig, 316 F.Supp. 1148, 1165-67 (S.D.N.Y. 1970). As this Court stated in Bernstein v. Travia, 495 F.2d 1180, 1182 (1974) (footnote omitted):

Whether a defendant's physical condition is so poor as to require a continuance or severance is not only a difficult determination for a judge to make, but it is one which carries with it the tremendous responsibility of weighing the invariably unpredictable factor of a defendant's health against the Government's, indeed the public's, legitimate interest in a fair and speedy disposition. Troublesome though it may be, however, that decision, as we have repeatedly held, see e.g. United States v. Bernstein, 417 F.2d 641, 643 (2d Cir. 1969); United States v. Knohl, 370 F.2d 427 (2d Cir.), cert. denied, 389 U.S. 973, 88 S.Ct. 472, 19 L.Ed.2d 465 (1967) is one reserved to the sound discretion of the district judge.

The trial court's judgment will be reversed on appeal only if the defendant was in fact unable to assist in his defense. United States v. Bernstein, 417 F.2d 641, 643.

^{4/} On May 5, 1977 this Court denied appellant's petition for a Writ of Mandamus seeking a stay of the trial (No. 77-3029).

No such showing has been made here. While appellant devotes considerable discussion to his illness, its diagnoses and its treatment (Br. 12-17; 19-21), he omits even a claim that his defense was handicapped, and indeed does not suggest the existence of a single item of evidence or other information that he might have employed but for his medical problems. The record demonstrates, moreover, that appellant was a frequent and active participant in his case both before and during the trial. The court noted at one pre-trial hearing that appellant had actively assisted his counsel (April 29, 1977 hearing, Tr. 12). Near the close of trial, the court observed that, "[a]ll during the trial I have noticed that Mr. Cooper has been in consultation with [defense counsel]. I have noticed that before and during cross-examination he has discussed matters with you and that he is not particularly a man in a catatonic state. I would like to portray for the record that he seems alert and knows exactly what is going on . . . I find the defendant is well-orientated and I would say that . . . his conclusion [regarding the handwriting exemplars] is well orientated." (Tr. 2.74, 2.76).

The record is likewise barren of any indication that appellant was suffering ill effects from the burdens of trial. Although the court had indicated that it would consider certain accommodations for appellant (App. 56A), he did not request either a recess or medical attention during the proceedings, nor did he seek extra time for consultation. These factors, which are relevant to a determination of appellant's competency at trial, see United

States v. Knohl, supra, 379 F.2d at 437; United States v. Bernstein, supra, strongly suggest that appellant was not impaired.^{5/}

Finally, we note that the district judge was hardly grudging in balancing appellant's interest in a vigorous defense against the public's right to a reasonably expeditious disposition of the charges. As the Supreme Court noted in Barker v. Wingo, 407 U.S. 514, 519 (1972), the "societal interest in providing a speedy trial" exists not only separate from, but also "at times in opposition to, the interests of the accused." Delay may prejudice the prosecution's ability to prove its case (see United States v. Avalos, 541 F.2d 1100, 1110 (5th Cir. 1976), cert. denied, 430 U.S. 970) and in all events prolongs the period during which defendants released on bail may commit other crimes. See Dickey v. Florida, 398 U.S. 30, 42 (1970) (Brennan, J., concurring). Excessive delay between accusation and conviction also undermines the efficacy of punishment as a deterrent to future crimes, threatens the chance for rehabilitation, and, in general, engenders disrespect for the criminal justice system. Barker v. Wingo, supra, 407 U.S. at 519-521; see H. Rep. No. 93-1508, 93rd Cong., 2nd Sess.

^{5/} Appellant's suggestion (Br. 11, 18) that his use of medication, including morphine, automatically impaired his ability to assist in his defense is incorrect. See United States ex rel Fitzgerald v. LaVallee, 461 F.2d 601 (2d Cir. 1972), cert. denied, sub nom. LaVallee v. Fitzgerald, 409 U.S. 885.

In this case, the district court delayed appellant's trial for the better part of three years while it carefully examined reports of his health, and granted an additional postponement when it felt an independent medical opinion might be useful. The previous opinions expressed by both appellant's and the government's physicians indicated that although appellant was in pain, the trial did not create any serious danger to his health, and that although the medication he was taking could affect his mental capacity, it would not necessarily impair his ability to defend himself. Dr. Alsop's testimony merely added support to that position, as did appellant's own conduct at the proceedings. Under these circumstances, the district court cannot be faulted for not allowing an already long delay to become an indefinite one.

II

THE COURT'S FAILURE TO GIVE A JURY INSTRUCTION CONCERNING EVIDENCE OF SIMILAR ACTS DOES NOT REQUIRE REVERSAL IN THE ABSENCE OF AN OBJECTION AND IN THE OTHER CIRCUMSTANCES OF THIS CASE.

The two checks charged in the indictment were not isolated instances. In order to prove appellant's fraudulent intent, the government also showed that between August and November, 1973, 8 other checks deposited into Franklin's account were returned uncollected, in each case because the drawee bank could not find an account listed in the name or account number on the check, or because the signature was illegible (Govt Ex 12,14,16,18,20,22,24,26). The evidence also showed that, although appellant normally conducted Franklin's business at the South Melville Branch, these checks,

like the two which formed the basis for the indictment, were generally deposited at other branches (Tr. 1.64, 2.3, 2.13, 2.16).

At the close of its case, the government requested a jury charge to the effect that evidence of other criminal acts may be admitted "if the acts are so connected to the offense charged that they serve to show a general pattern and to prove the necessary criminal intent or guilty knowledge" (Govt App A). Appellant opposed the language of the proffered instruction, and suggested a charge simply that "criminal responsibility may be proved by circumstantial evidence " (Tr. 2.88-89). The court agreed with the thrust of the instruction proposed by the government (Tr. 2.89-2.90) but, apparently though inadvertance, did not give that or any similar charge. After the instructions were given, defense counsel took issue with one passage (Tr. 3.24), but did not object to the court's failure to give an instruction concerning evidence of other crimes and in fact agreed that he had no "objections or exceptions to any other part of the charge" (Tr. 3.27). Appellant now contends, however (Br. 9-10), that despite this statement and despite his failure at any time during the trial to request an instruction limiting the jury's consideration of evidence of other crimes to the purposes for its admission, the court's failure to give such a charge requires reversal of his conviction.

This claim is wholly without merit. As the Supreme Court has recently noted, Henderson v. Kibbe, 431 U.S. 145, 154 (1977), it "is a rare case in which an improper instruction will justify

reversal of a criminal conviction when no objection has been made in the trial court." It has long been the rule in this Circuit that failure to request a limiting instruction or to object to the court's charge precludes review. United States v. Papadakis, 510 F.2d 287, 295 (2d Cir. 1975), cert. denied, 421 U.S. 950; United States v. Cifarelli, 401 F.2d 512, 514 (2d Cir. 1968), cert. denied, 393 U.S. 987; United States v. Bozza, 365 F.2d 206, 214 (2d Cir. 1966); United States v. Indiviglio, 352 F.2d 276 (2d Cir. 1965) (en banc), cert. denied, 383 U.S. 907 (1966). Having failed to request such an instruction^{6/} or to remind the court of its omission, appellant is foreclosed from now seeking a new trial on this ground.

At all events, viewed in light of the entire trial (United States v. Park, 421 U.S. 658, 674-675 (1975)), there is no reasonable possibility that the court's omission prejudiced appellant. The prosecutor's own summation noted that while a number of checks had been introduced, only two were subjects of the indictment, and that - in words that paraphrased the instruction appellant had requested a few moments earlier - the others were

^{6/} Appellant's counter-proposal for a charge that "criminal responsibility may be proved by circumstantial evidence" (Tr. 2.88-2.89; App. 45A-46A) cannot reasonably be characterized as a "limiting" instruction, since it would not have limited to jury's consideration of the other-crimes evidence to the purposes for its admission and in fact could have been taken by the jury as expanding the range of inferences it would be permitted to draw.

only "circumstantial evidence" (Tr. 2.94-2.95). The prosecutor continued to make it clear throughout his argument that this evidence was directed at proving appellant's intent to defraud and knowledge that the checks falsely made (See, e.g., Tr. 2.99-100, 2.107, 2.109, 2.111-112, 2.113). Since all the transactions were closely related in time and manner to the charged acts, it was natural for the jury to regard them for what they were - evidence of a common scheme - rather than a general condemnation of appellant's character. Finally, the evidence of appellant's guilt was substantial and uncontradicted. Each of the two checks mentioned in the indictment was made out for a large amount of money payable to appellant's business. Appellant had admitted depositing both of them in the business account, and handwriting analysis established that he had endorsed at least one. The evidence left no doubt that the two checks were completely fraudulent; each was made out on a counter form, drawn on different out-of-state banks, marked with fictitious account numbers and signed in an indecipherable hand. Under all the circumstances, it cannot be said that the failure of the court to give a limiting instruction - even had one been requested - constituted reversible error. United States v. Glasser, 443 F.2d 994, 1003 (2d Cir. 1971), cert. denied, 414 U.S. 854. See also Harrington v. California, 395 U.S. 250, 254 (1969).

III.

MONTHLY BANK STATEMENTS WERE PROPERLY ADMITTED INTO EVIDENCE

Appellant finally contends (Br. 23-26) that the trial court erred in admitting into evidence checking account statements on Franklin's account, alleging deficiencies in the foundation established.

The evidence in question, Government Exhibit 3, consisted of computer-printed monthly statements from July 31, 1973 to January 31, 1974, listing by date all deposits made into and checks paid out of Franklin's checking account (Tr. 1.87). The notation "DM" (Debit Memo) appeared next to certain items, indicating that a deposited check was returned unpaid, causing Franklin's account to be debitted (Tr. 1.88). The statement dated November 30, 1973 reflected Franklin's final balance as an overdraft of \$19,588.23. The statements were introduced through the testimony of John Post, an Assistant Secretary and commercial loan collection officer with Long Island Trust Company (Tr. 1.82). Post explained the bank's procedures for receiving deposits and recording the transactions; he further detailed the manner in which the deposit slips were delivered to the data processing center, where the information regarding deposits and checks paid out was fed into the bank's computer and stored until, on the second business day of the following month, the computer prepared the monthly statement (Tr. 1.86-90).

Appellant examined Post on voir dire and determined that he had not personally fed information into the computer and did not know the person responsible for doing so (Tr. 1.91-1.92). Appellant then objected to the admission of the statements. The court overruled the objection and permitted the statements to be admitted, holding that they were made in the regular course of business (Tr. 1.92-93).

a. Appellant now contends (Br. 23-24) that although the court found the statements to have been prepared "in the course of a regularly conducted business activity," no showing was made that they were also composed as a "regular practice" as required by Rule 803(6) Fed.R.Evid. But the record refutes this contention. Post testified that the statements were rendered on a regular basis to the customer and depicted "monthly" transactions in the customer's account (Tr. 1.86); the statements were prepared on the second day of each month and mailed to the account holder along with his checks (Tr. 1.90). The testimony of this witness, who was familiar with the day-to-day operations and regular practices of the bank, fully satisfied requirements of Rule 803(6). See United States v. Rosenstein, 474 F.2d 705, 710 (2d Cir. 1973); United States v. Delgado, 459 F.2d 471, 472 n. 5 (2d Cir. 1972); Hoffman v. Palmer, 129 F.2d 976 (2d Cir. 1972), affirmed, 318 U.S. 109 (194).

b. Appellant further alleges (Br. 25-26) that the reliability of the computer process was "doubtful." However, he did not object to the admission of the monthly statements on that ground, or for any stated reason, and the court could not have surmised such

a basis for the objection since no question in the preceeding voir dire examination was directed to computer mechanics. By failing to make a specific objection, appellant has waived his opportunity to raise the issue here. D & H Auto Parts, Inc. v. Ford Marketing Corporation, 57 F.R.D. 548, 552 (SDNY, 1973); United States v. DeGeorgia, 420 F.2d 889, 893 n. 11 (2d Cir. 1969), cert. denied, 397 U.S. 1008; United States v. Fendley, 522 F.2d 181, 186 (5th Cir. 1975).

In any event, testimony describing the programming or internal processes of a computer is not prerequisite to the introduction of computer-printed statements otherwise admissible as business records. As long as testimony is offered describing the information fed to the machine and how it has been collected, computer data regarded as inherently sufficiently reliable to be admitted. See United States v. Fendley, supra, 522 F.2d at 185, 187; Perma Research and Development v. Singer Co., 542 F.2d 111, 125 (2d Cir. 1976), (Van Graafeiland, J., dissenting), cert. denied, U.S. ; Olympic Insurance Co. v. H.D. Harrison, Inc., 418 F.2d 669 (5th Cir. 1968); United States v. Scholle, 553 F.2d 1109, 1124 (8th Cir. 1977). Rule 803(6), Fed.R.Evid., expressly provides for the admissibility, as business records, of "data compilation, in any form" and the Advisory Committee Note to the Rule expressly includes "electronic computer storage" in its discussion of the reliability of business records:

The element of unusual reliability of business records is said variously to be supplied by systematic checking, by regularity and continuity which produce habits of precision, by actual experience of business in relying upon them, or by a duty to make an accurate record as part of a continuing job or occupation.

Where, as here, the computer-printed records have been made regularly, for routine business purposes, and relied upon as a matter of course, there is no reason to require more proof of their reliability than is required for other business records.^{7/}

"In relying upon data processing by a machine, there should be no more necessity for oral testimony concerning the reliability of the machine operations than that of the manual procedure supplanted, whether it be bookkeeping, order preparation, or mathematical computation." Freed, Roy N., A Lawyer's Guide Through the Computer Maze, 6 Prac. Law 15, 28 (November 1960), quoted in D & H Auto Parts, Inc. v. Ford Marketing Corporation, supra, at 552.

Finally, the reliability of the statements was verified by other bank records, which, as Post testified, also indicated that in September and October 1973 an unusual number of uncollectable checks were deposited into Franklin's account (Tr. 1.95-96). Those checks and deposits slips were themselves admitted into evidence (Govt Ex 11-30). The computer statements were, accordingly, simply summaries of a series of transactions proven independently by the original records. Since the statements were both confirmed by that evidence and cumulative of it, their admission, even if preceeded by inadequate foundation, was harmless.

^{7/} Appellant cites as evidence of the computer's unreliability a portion of Post's testimony in which he states that the computer is sometimes "out of line as to frequency" (A. 43, Tr. 2.48). The meaning of that passage was not elaborated in further testimony and is not clear to us; however, Post continued to say that if he were confronted with these statements he would have been alerted to inquire as to the reason for the unusual number of overdrafts and returned checks, directly implying that the computer's operations are sufficiently dependable that he would rely on them in the course of his work (Tr. 2.49).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgments of conviction should be affirmed.

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CERTIFICATE OF SERVICE

I hereby certify that copies of this Brief for the United States, appellee were deposited in the United States mail, postage prepaid, addressed to below counsel of record.

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APPENDIX A

Request No. 12

Evidence of other acts even though criminal in nature, is admissible if the acts are so connected to the offense charged that they serve to show a general pattern and to prove the necessary criminal intent or guilty knowledge.

Spencer v. Texas, 385 U.S. 554 (1967);

Lisbena v. California, 314 U.S. 219 (1941);

United States v. Crisona, 416 F.2d 107 (2nd Cir. 1969), cert. denied, 397 U.S. 961;

United States v. Deaton, 381 F.2d 114 (2nd Cir. 1967);

United States v. Byrd, 352 F.2d 570 (2nd Cir. 1965);

Kowalchuck v. United States, 176 F.2d 873, 868 (6th Cir. 1949).

